No. 8373

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

THEODORE THOMPSON,

Appellee.

On Appeal from the District Court of the United States for the District of Montana.

BRIEF OF APPELLEE

MOLUMBY, BUSHA & GREENAN,
Great Falls, Montana,
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STATEMENT OF THE CASE

Facts stated by Appellant in their Statement of the Case are correct.

QUESTION PRESENTED

The Assignment of Errors specified in the brief of Appellant raises but a single question, namely; Is there any substantial evidence to justify the verdict of the jury? (See Brief of Appellant, p. 2, 3 & 4).

POINTS AND AUTHORITIES

I.

In passing on question involved, this Court must take the evidence in the most favorable light to the Appellee, must presume that all conflict in the evidence was

resolved in favor of the Appellee, and must resolve all conflict in the evidence in favor of the Appellee, and this court is not warranted in substituting its judgment on the evidence for that of the jury and the trial Court.

Henry W. Cross Co. vs Burns
81 F. (2nd) 856,

E. K. Wood Lbr Co., vs. Anderson
81 F. (2nd) 161

Phillips Petroleum Co. vs. Manning
81 F. (2nd) 849

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79 F. (2nd) 790

U. S. vs. Hossman
84 F. (2nd) 808

U. S. vs. Fancher
84 F. (2nd) 306

II.

The education, experience, mental and physical capabilities of the Appellee and the circumstances under which the Appellee's wounds and disabilities were received together with the subsequent history of Appellee and his disabilities must all be considered in determining whether or not Appellee was totally and permanently disabled during the life of his policy and remained so at all subsequent times.

Lumbra vs. U. S. 290 US 551
54 S. ct. 272 78 L. ed. 492

III.

Evidence that Appellee lost left leg five inches above the knee and suffered an injury to his right knee, permanent in character, causing slipping of an internal semi-lunar cartilage, suffered from measles and mumps, necessitating hospitalization for six weeks and confinement to quarters for a period of two or more weeks leaving him in a weakened and extremely nervous condition, and that while in this condition, he drank poisoned water, which caused dysentery and vomiting from which he never recovered and caused an infection of the bladder diagnosed as chronic colitis, from which he never recovered and that thereafter he was severely gassed and thereafter lost his leg and that from the time that he suffered his attack of measles and mumps, has continuously been nervous to an extent that he is unable to concentrate or be around other people, amply sustains the findings of a jury that he was totally and permanently disabled.

Lumbra vs. U. S. 290 US 551,
54 S. ct. 272 78 L. ed. 492

U. S. vs. Hossman
84 F. (2nd) 808

U. S. vs. Fancher
84 F. (2nd) 306

U. S. vs. Christenson
82 F. (2nd) 311

U. S. vs. Domanque
79 F. (2nd) 647

U. S. vs. Rucker
80 F. (2nd) 369

U. S. vs. Huddleston
81 F. (2nd) 593

and it is not error to submit such a case to a jury.

U. S. vs. Hannan
85 F. (2nd) 341

U. S. vs. Vallandza
81 F. (2nd) 615

U. S. vs. Trollinger
81 F. (2nd) 167

Corrigan vs. U. S.
82 F. (2nd) 106

U. S. vs. Edson
79 F. (2nd) 866

IV.

The effect of such evidence cannot be controverted by a contention that the lack of work record was voluntary, by reason of compensation having been paid by the government in an amount sufficient to maintain Appellee and in excess of what he earned prior to his entry into the army.

U. S. vs. Fancher
84 F. (2nd) 306

ARGUMENT

In reviewing the question of whether or not there is sufficient evidence to justify the verdict, this Court must take the evidence in the most favorable light to the Appellee, and must presume that all conflict in the evidence was resolved in favor of the Appellee, and this Court is not warranted in substituting its judgment on the evidence for that of the jury and the trial court.

Henry W. Cross Co. vs. Burns,
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U. S. vs. Huddleston,
81 F. (2nd) 593,

Booth vs. Gilbert,
79 F. (2nd) 790.

Counsel for the Appellant in their brief, contrary to the above rule, has stated only a portion of the evidence and this in the most unfavorable light to the Appellee, and has failed to state that evidence favorable to the Appellee, and wherever there is a conflict in the evidence, has selected that portion of the evidence which was most unfavorable to the Appellee. Instead of presenting the full picture in their argument, counsel have taken only isolated bits of the evidence and quoted the same as if that were the only evidence in the case.

EVIDENCE AMPLY SUSTAINS THE VERDICT

A thorough study of the Transcript will show that the verdict of the jury was amply sustained by the evidence. Appellant contends that the evidence shows that he is merely a one-legged man and that his other injuries and disabilities are of a trivial nature, and not shown to be incurable and that the evidence shows that he has farmed with success, all of which statements are directly contrary to the evidence.

The evidence discloses many injuries and disabilities acquired while in the Service and the sequence of these

injuries are important for the reason that at the time his major handicap was acquired, he was in a weakened physical condition which increased the disabling effect of the major handicap, and in turn the major handicap increased the effect of the other disabilities.

In determining the effect of injuries and disabilities, one must take into consideration not only the actual injury and its nature, but one must take into consideration also the surrounding conditions under which the injury was received and in addition thereto, the nature, experience and education of the man injured. As the Supreme Court of the United States has said:

> "That which sometimes results in a total disability may cause slight inconvenience under other conditions. Some are able to sustain themselves without serious loss of productive power against injury or disease sufficient totally to disable others". (*Lumbra vs. U. S. 290 US 551 54 S. Ct. 272, 78 L. ed. 492*).

The evidence discloses that the Appellee was born and raised in Norway and came to this country in 1912 unable to talk English; that after his arrival in this country, he associated with Norwegians and picked up very little knowledge of the English language, got so he could understand the simple words of English but still was unable to talk English to any extent when he was inducted into the Service; that he has never acquired sufficient knowledge of the English language to be able to read and write; that he can read simple words in the English language but cannot understand very much of what he reads; that he had gone to school in Norway but had no schooling whatever in this country (R. 19

and 20; R. 46 to 48). Even at the trial, the Appellee did not know the meaning of such simple words as "status", "voluntary", "discontinue", "preference" (R. 113 to 114); but more important still, the lower court and the jury saw the Appellee, saw him for days of questioning and cross-questioning and knew what his mental capabilities were and knew from that observation just how ignorant he was, and knew also just how disabling this type of injury to this type of man would be, and saw also just what effect this type of injury had upon the man's nervous and mental make-up—something that cannot be transcribed into a record and had that advantage which this Court can never obtain.

APPELLEE SUFFERS FROM FIVE SERVICE INCURRED DISABILITIES

While in the service the Appellee incurred and suffered four separate and distinct disabilities, aside from and in addition to having his left leg blown off, each of which have continuously since they were incurred seriously disabled and greatly contributed to the handicap caused by the loss of the leg.

1.—INJURY TO RIGHT KNEE:

Shortly after reporting for service and while at Camp Lewis, the Appellee injured his right knee while on a night maneuver. He fell into a hole and twisted his right knee. It swelled up, hurt and caused him to limp. The Captain relieved him of all duty (R. 20-21) for a week or ten days (R. 50). The injury was described by a doctor as being an internal semi-lunar cartilage slip

with crepitus (R. 128-129) and the effect of which was described by the Appellee as continuous pain when used effecting him when he walks, has to place his foot just right otherwise it hurts and grinds back in his knee, and to overcome the situation, he has to take ahold of it and hold it in place, there is kind of a catch in there (R. 21). This injury might have been slight in itself had nothing further occurred to the Appellee, but thereafter he had his other leg blown off. While he had both of his legs, he could favor the injured right knee, but when his left leg was blown off, it was necessary for him to put all his weight on his right leg and accentuated the disability occurring from the injury to his right knee. The Appellee states that the injury to the right knee gets worse all the time, because now he is a one-legged man and has to put his weight on it (R. 21). The doctor likewise said that the loss of his other leg increased the disability arising from the injury to his right knee (R. 129). That this injury is and has been of a permanent nature is shown not only by the fact that it has continued with him all these years but that the doctors in the army told him that there was nothing that they could do for it (R. 55-56).

2.—MUMPS, MEASLES AND NERVOUSNESS:

A few weeks after the injury to his right knee, the Appellee contracted measles and mumps, was in the hospital for a month or six weeks and was "marked quarters" for an additional two weeks, remaining in quarters without doing duty because of his illness, and from this illness he lost a great deal of weight, was left weak and

extremely nervous (R. 21-22). Whether or not the attack of the measles and mumps was the inception of his nervous condition is a matter difficult to say, it is more than probable that it was not the measles and mumps alone that caused this nervous condition but the aggregate of all the things that occurred to him while in the army. This much, however, is certain that the record is replete with proof that his nerves were shattered and have been continuously a portion of his disability (R. 21-22; 34; 56; 131; 141; 144 and 151). His nerves were so completely shattered that he cannot on account of his nervous condition, even live in a town or city (R. 99).

3.—COLITIS, POISONED WATER, DYSENTERY:

The Appellee hardly got out of the hospital from the above mentioned attacks when he was sent overseas and sent to the front line trenches on the Meuse-Argonne front. He was up there some sixteen days, started back for rest camp, but was immediately ordered back up to the front where he remained for another ten days. During this time, they were unable to get any water for drinking except out of the shell holes and in coulees on the front, that was the only water they had to drink. It was infected by reason of the fact that before gathering in the shell holes and coulees, it had run over dead men, dead horses, and in addition was contaminated by the fact that the area was entirely covered with poisonous gas which sinks down and settles in the lowest spots and settled in the water, contaminating it. The only food they had to eat was food that was carried in cans. From the food and the poisoned water, the Appellee, suffered severe

cramps, dysentery and diarrhea to such an extent that it caused him to pass blood and had continuous spells of nausea and vomiting (R. 24-25). This has remained with him continuously causing him to get spells of vomiting where he could not even hold common drinking water on his stomach. Such spells will come on him at intervals and sometimes will last as long as a month (R. 26). The repeated and continuous dysentery and diarrhea has in the opinion of the doctors caused a condition of colitis which as the records show was diagnosed by the doctors as early as 1924 (R. 118) (R. 119). He has continuous and alternating spells first of diarrhea and then constipation and cramps in the abdomen (R. 119). This contion, too, is of a permanent nature and incurable. Dr. Richards states that his colitis condition in 1924 was not only diagnosed colitis but that the prognosis was very doubtful. That only time could tell whether or not the condition was permanent (R. 119-120). Time and the actual experience has proven that it is permanent because it has remained with him all these years.

4.—SEVERELY GASSED:

After returning to the Argonne on the second occasion, the Appellee was severely gassed. When they went up the second time, they had many new men as replacements and in helping the new men get on their gas masks, he himself got considerable gas before he could get his mask on. It was mustard or cloud gas. It effected him in the usual way gassing effects men, choked him, he was unable to get his breath, became sick to his stomach and ever since he has been short-winded (R. 25-26).

This severe gassing has probably contributed and increased the disability which the Appellee has described as continuous stomach trouble and which the doctor finally diagnosed as colitis, that had its inception with the drinking of the poisoned water as well as being the cause of his continuous shortness of breath.

Appellee's experience with the poisoned water and gas is an experience which many other soldiers had but here is demonstrated the wisdom of the Supreme Court in the language above quoted wherein they say:

> "That which sometimes results in total disability may cause slight inconvenience under other conditions."

One of the witnesses for the Appellee with him at the time they were gassed had the same experience of drinking poisoned water and the same experience of being gassed with the same results of shortness of breath and dysentery, weakness and loss of weight, but he recovered (R. 141-142) but the circumstances were different. He had not been injured in the leg prior to this experience, he had not been weakened by months in the hospital by reason of measles and mumps, the wounds that he afterwards suffered were of a far less serious nature, he did not have his leg blown off. The Appellee on the other hand was weakened at the onset of the attack of stomach trouble and dysentery and the effect therefore was greater; the Appellee in addition to that afterwards suffered a far more serious disability in having his leg blown off which naturally makes the disability suffered before the loss of his leg more apt to tear down his constitution.

5.—LEG BLOWN OFF:

In the afternoon of October 31, 1918, the Appellee was hit with shrapnel in the left leg, completely shattering the leg, when he came to he was in a dressing station and was later carried by an ambulance to a field hospital where they amputated his left leg, just above the knee (R. 27-28). The leg became infected with gangrene, after he had been moved from the field hospital to a base hospital where they treated the leg for the gangrene and operated on him several times. His condition at that time was such that he cannot remember how many times he was operated upon but he knows that it was more than once (R. 28-29) and in one of the operations they had to cut the leg off again. His leg was first amputated about two inches above the knee (R. 31). The second time it was cut off, it was cut off about five inches above the knee (R. 126). After his return to this country a third operation was necessitated in which they took off what was called a "spur" (R. 31). The loss of the leg has disabled him the same as it would any other man with his training, experience, mental capabilities and education.

APPELLEE NOT MERELY A ONE-LEGGED MAN

Appellee is seeking to recover his insurance not upon the fact that he is a one-legged man, nor upon the fact that he has continuously suffered a severe stomach disorder which despite constant treatment and dieting has caused continuous spells of vomiting, nausea and severe cramps, nor does he seek to recover because the severe gassing which he encountered has continuously

caused shortness of breath and consequent inability to exert himself, nor does he seek to recover simply because his nerves have become completely shattered and wrecked to such an extent that he cannot even reside in a small rural town because of the effect of the activity there upon his nervous system, but Appellee seeks to recover his insurance because he contends and the jury believed and the Court believed that the combination of all of these disabilities has unfitted him for any occupation whatever.

VOCATIONAL TRAINING

Appellee took about three months' vocational training at the Agricultural College at Bozeman, Montana, with the objective of becoming a crop inspector or meat inspector (R. 33 to 35) (R. 83). While in vocational training, the Appellee was constantly ill, continuously vomiting, continuous stomach trouble, his nervous condition was such that he was jumpy and excitable and was unable to apply himself or study (R. 34-35). In addition to this because of his previous education and lack of knowledge of the English language, it was absolutely impossible for him to keep up with his class. He was unable to understand English well enough to learn anything and after talking the matter over with his instructors, he was compelled because of his physical condition and lack of knowledge to quit training (R. 34-35).

WORK RECORD

The record shows that the Appellee has not earned $100.00 by his own effort, since his discharge from the

army, and it likewise shows that he has been unable to do anything that a nine-year-old boy or an eighty-year-old man cannot do. Appellant predicates his argument that Appellee has earned some money by a statement not warranted by the evidence. Appellant states that the Appellee had an income of $10,000.00 in addition to the amounts received by his compensation and soldier's bonus, and through inheritance and unpaid loans. This is not a fact. The testimony shows that the total amount of money deposited by him from the date of his discharge until date of trial was $27,218.92 (R. 171) and the testimony shows that he received by way of compensation and deposited in the bank $14,832.62 (R. 173) and in addition he received $240.00 training pay (R. 173) and he borrowed $2,500.00 cash and placed that in the bank (R. 179), that he borrowed an additional $1,800.00 in cash and placed that in the bank (R. 179), that he inherited $600.00 and placed that in the bank (R. 180), and he received $750.00 on his Adjusted Compensation Certificate and deposited that in the bank (R. 180); in addition to this according to the testimony of the President of the Bank, he borrowed from the bank and deposited in the bank from $250.00 to $300.00 each year (from the date of his discharge until the date of trial, a period of seventeen years) (R. 178-179). In its most favorable light, this would amount to the sum of $5,-100.00, which leaves a balance of $1,396.30 acquired by him over a period seventeen years from sources other than those mentioned above. If we assume a fact not shown in evidence that this $1,396.30 was the result of

his own earnings, the proof in the record amounts to no more than to say that he did earn in such fashion the sum of $82.13 a year.

Appellant argues that because Thompson has acquired title to certain land, certain farm machinery and cattle, that he has worked to acquire this property and that this fact negatives his contention of total permanent disability. However, the premises from which counsel argues is contrary to the evidence. In the first place, his property was acquired not from any effort on his part, after his discharge from the army, but was acquired before he went into the army and while in the army. The evidence shows that he filed on a homestead before he went into the army (R. 36) and that he placed some of the improvements necessary to prove up said homestead on the land before he went into the army, and the balance was placed on the land while he was in the army (R. 36-37) and his residence and work necessary to prove up was all done prior to his entry into the army (R. 36-37).

That such proof could be made cannot be questioned—our Homestead Acts provide for just such proof (See Secs. 271, 272 and 273 U. S. C. A. Title 43) (R. S. Sec. 2305; March 1, 1901, c. 674, 31 Stat. 847; July 28, 1917, c. 44 Sec. 2, 40 Stat. 248; February 25, 1919, c. 37, 40 Stat. 1161; Apr. 6, 1922, c. 122, Sec. 1, 42 Stat. 491).

The evidence discloses that he bought the present property on which he now resides by borrowing $2,500.00 from his cousin, Carl Bue, and giving him a mortgage upon the land that he bought as well as upon the homestead; subsequently he paid back the $2,500.00 by deeding the home-

stead to the said Carl Bue (R.38and100); in other words, the place that he is residing on now represents nothing more than a trade of the homestead he acquired by work done prior to the time that he entered into the army for the land on which he now resides. The other land that he bought, he bought with money that he borrowed, and to secure which he gave a mortgage which is past due and in default, and on which he has paid nothing (R. 38). The farm machinery and cattle have all been purchased with the money paid to him for compensation, none of it was the result of his own effort (R. 38-39).

At no time has he acquired enough income from the ranch to keep the ranch self-supporting (R. 39 and 109). He acquired the ranch not for the purpose of farming it or deriving any income from it but merely to have a home (R. 100). There has never been a year since he got out of the army when the returns from the land were sufficient to pay for the help required to run it or has there been a year that he could have paid the men to run the place had it not been for the compensation he received from the Government (R. 109 and 113).

The Appellant in his brief speaks of him supervising a farm. The extent of his supervision is such supervision as could be given by anyone who is laying on his back completely paralyzed—somebody comes and tells him that the fence is down and he tells the man to fix it, never goes out to inspect the work that they do, is unable to do so All other work done on the ranch is supervised the same way (R. 116-117). The evidence shows that this man never did any work on the ranch himself, that at all times when

any work was to be done, he had hired men to do it, paid them out of his compensation. The greatest amount of cattle that he has had at any time is forty head, (R. 39) the testimony is that he was not able to take care of them himself nor do any work toward taking care of them but hired a man to do it (R. 39). It is common knowledge that a man at all physically able can take care of three hundred to five hundred head of cattle, except during the time of haying.

ISOLATED PORTIONS OF EVIDENCE CITED BY APPELLANT

Counsel for the Appellant contends the Appellee rides a horse. The evidence is that he has on several occasions got on an old gentle plow horse and rode it on a walk; that to get on the horse he has to get up on a box or cut bank or something of that kind, put his right foot in the stirrup, then take his right foot out of the stirrup and swing it over the horse's back; that to do this, if the horse moved, he would fall off and get seriously hurt (R. 40). This testimony of the Appellee was corroborated by all the other witnesses. In other words, the testimony discloses that he can ride a horse just like a six-year-old child, many of whom have been put on just such a horse and rode it at a walk.

Counsel for the Appellant contends that Appellee is able to work because he has milked a cow. The record discloses that he can milk a gentle old cow, but that in attempting to do so, he got hurt and that with only two cows to milk, it is the hired man who does the milking. (R. 39).

Counsel for the Appellant contends that he drives a team and consequently is able to work. The Record discloses that never since he got out of the army has he been able to harness a team; that he did drive a derrick team hitched to a little cart while putting up hay (R. 40). The evidence also discloses that a neighbor saw him drive such a team and this neighbor explains just how difficult this work is by saying that he has a son nine years old who does the same thing (R. 135).

Counsel for the Appellant contends that he has driven a car and that that indicates that he can work. The evidence shows that he has driven a car but the evidence also describes what motions it is necessary for him to go through to drive it, that when he drives a car even for a short distance, he gets so nervous and it hurts his back so much that it is necessary for him to stop and rest on one or two occasions even when he drives a distance of twenty-five miles (R. 40 and 41). His testimony in this respect is corroborated by practically all of the witnesses called to the stand.

Counsel for the Appellant makes mention of the fact that his place looks good and well kept and the forty acres of hay appear to be in good condition. This is nothing more than a compliment to the man he has hired because the evidence discloses that he never at any time, himself, put in any crop or did anything to make the place look good; that it has been maintained exclusively, as pointed out above, by compensation paid to him by the government, and has not been maintained by any effort of the Appellee or any funds acquired from the working of the ranch.

APPELLEE MADE IMMEDIATE APPPLICATION FOR HIS INSURANCE

As early as December 18, 1919, Appellee wrote the United States Veterans Bureau:

> "I know that a number of men similarly injured are drawing their insurance. I am writing to you to inquire whether I am entitled to do likewise. I am drawing a $30.00 per month compensation and I am totally and permanently disabled insofar as my former occupation of farming is concerned." (R. 65 and 67.).

ALL OF APPELLEE'S DISABILITIES AROSE PRIOR TO HIS DISCHARGE FROM THE ARMY

Each of the disabilities above enumerated arose prior to the time he was wounded in the left leg and had the leg taken off, and have constantly remained with him and disabled him during all of the years since that time, as is shown above. In addition he was discharged by a surgeon's "Certificate of Disability" (R. 42) with a notation upon his discharge that his physical condition at the time of discharge was poor (R. 44).

EVIDENCE CONFLICTING

The mere reading of the summary of evidence contained in the brief of the Appellant and of the summary given above or of the evidence given in the pages of the Record cited above discloses that there was considerable conflict in the evidence. Certainly there is much conflict with the inferences that the Appellant now seeks to draw from the evidence. As an illustration, Appellant seeks to infer from the fact that the Appellee in signing a letter to the government written out by someone else way back on Dec. 18, 1919, did not mention his stomach trouble and the condi-

tion of his bowels, and mentioned only his major disability, the loss of his leg and slight wounds about the face, that therefore the other disabilities did not exist or were not at all disabling (See Brief of Appellant p. 12), yet it cannot be contradicted that there is evidence in the Record that from the time he drank the poisoned water and became gassed, he had continuous dysentery and vomiting spells, nor can it be contradicted that the Record discloses that a government doctor diagnosed this condition as chronic colitis from infected bowels, the result of severe and chronic dysentery (R. 117 to 124). Nor can it be doubted that the doctor at that early date questioned the possibility of the Appellee recovering from the colitis and infected bowel condition.

Counsel argues that it should be inferred from the evidence that these different disabilities, other than the loss of his leg, might have yielded to treatment but this is pure speculation. The injury to his right knee, the drinking of the poisoned water and gassing all took place at the Front. It is possible, true, that had he immediately reported back to a hospital, he might have recovered from the effects of these diseases, but certainly the contract of insurance did not contemplate that a Regiment or Division after drinking poisoned water or getting gassed should all report back to the hospital. The fact is, as shown by the evidence, that the Appellee reported to the hospital after all these things happened, and his life thereafter for more than a year was just one hospital after another, and if treatment could have been of avail, the treatment he received in the various hospitals should have accomplished this cure. It

is a fair inference that not having been cured, it could not be cured. In fact the testimony, itself, shows that it was incurable, and discloses that the doctors at the hospital told him nothing could be done for the injured right knee (R. 55-56). The doctors in the army told him that nothing could be done for his stomach and bowel condition, that it might clear up after he had rested and had good food, but there was nothing that they could do for it (R. 55). Yet with the proper food and after his discharge from the army, we find the government doctors giving a prognosis of the condition as very doubtful and subsequent history thereof shows that it has not been cured and could not be cured by proper food.

This Court in passing on the question here involved must not only assume as established all the facts that the evidence supporting Appellee's claim reasonably tends to prove but must assume as established all reasonable inferences fairly deducible from such facts.

Gunning vs. Cooley 281 US 90 50 S. Ct. 231
74 l. ed. 720

U. S. vs. Hossman
84 F. (2nd) 808.

CONCLUSION

The five disabilities suffered by the Appellee while in the army and shown to have remained with him and to have disabled him ever since his discharge coupled with the fact that he was discharged on a surgeon's Certificate of Disability with his physical condition at that time shown by the discharging officers to have been poor, and that all of his disabilities have clearly been shown to have arisen

while his policy was in effect, and that almost immediately after his discharge from the army, he sought to recover his insurance and that there is no work record at all to contradict his statement that he has been unable to work, all taken in conjunction with his previous experience, knowledge and education and the type of man he was, conclusively establishes that there was no error in submitting the case to the jury and that there was not only ample evidence to sustain their verdict but that the evidence was such that would compel the verdict given.

Respectfully submitted,

MOLUMBY, BUSHA & GREENAN,

Attorneys for the Appellee.